No. 95-1004

Supreme Court, U.S.
FILED
JAN 22 1996
CLERK

In The

Supreme Court of the United States

October Term 1995

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,

Petitioner,

v.

RHEEM MANUFACTURING COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

RUSSELL GUNTER
Counsel of Record
ABRAHAM BOGOSLAVSKY
McGLINCHEY STAFFORD LANG,
A Professional Limited Liability Company
425 West Capitol Avenue
Suite 3900
Little Rock, Arkansas 72201
(501) 371-9999

HUGO SWAN, JR.
McGLINCHEY STAFFORD LANG,
A Professional Limited Liability Company
101 North 10th Street
Suite D
Fort Smith, Arkansas 72901
(501) 783-8200

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Is the Eighth Circuit's definition of "employer", for purposes of 29 U.S.C. §1381, in conflict with the definition of "employer" used by the Second and Eleventh Circuits?

2. Is a company entitled to a legal determination whether it is an "employer" for purposes of 29 U.S.C. §1381 before it is obligated, as an employer, to arbitrate that question pursuant to 29 U.S.C. §1401(a)?

PARTIES

Pursuant to Rule 29.6 of the Rules of the United States Surpreme Court ("Rules"), the following are parent companies and nonwholly owned subsidiaries of Respondent, Rheem Manufacturing Company:

Parent Companies:

PI. US Holding, Inc.
PACE Industries, Inc.
PACE Group Holdings, Inc.
PACE Group, Inc.

Non-Wholly Owned Subsidiaries:

Gemaire Distributors, Inc.
Heating & Cooling Supply, Inc.
Confort Supply, Inc.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS TO DENY THE WRIT 2

SUMMARY OF ARGUMENT 2

A. THE DECISION OF THE EIGHTH CIRCUIT IS NOT IN CONFLICT WITH THE DECISIONS OF THE SECOND AND ELEVENTH CIRCUITS ... 3

1. The Eighth Circuit expressly adopted the definition of "employer" used by the Second and Eleventh Circuits 3

2. Petitioner's reliance on 29 U.S.C §1392(a) is improper and inapplicable 4

3. There is no conflict between the decision below and interpretations of the federal agency that oversees MPPAA 7

B. THE COURTS OF APPEALS HAVE CORRECTLY DETERMINED THAT THE ISSUE OF STATUTORY EMPLOYER COVERAGE UNDER THE MPPAA IS ONE TO BE RESOLVED BY THE COURTS PRIOR TO ANY EXHAUSTION OF ARBITRATION 9

CONCLUSION 11

TABLE OF AUTHORITIES

Page(s)

CASES

Banner v. Central States, Southeast and Southwest Pension Fund, 875 F.2d 1285 (7th Cir. 1989)..... 10

Board of Trustees of Trucking Employees Pension Fund v. Centra, 983 F.2d 495 (3rd Cir. 1992)..... 10

Bowers v. Transportacion Maritima Mexicana S.A., 901 F.2d 258 (2nd Cir. 1990) 6, 10

Carriers Container Council, Inc. v. Mobile Steamship. Ass'n – Int'l Longshoreman's Ass'n, AFL-CIO Pension Plan & Trust, 896 F.2d 1330 (11th Cir. 1990), *cert. denied*, 498 U.S. 926 (1990) 4

Flying Tiger Line v. Teamsters Pension Trust Fund, 830 F.2d 1241 (9th Cir. 1987)..... 10

Korea Shipping Corp. v. New York Shipping Ass'n – Int'l. Longshoremen's Ass'n Pension Trust Fund, 880 F.2d 1531 (2nd Cir. 1989) 3, 4

Mason & Dixon Tank Lines, Inc. v. Central States, Southeast and Southwest Areas Pension Funds, 952 F.2d 156 (6th Cir. 1988)..... 10

Metropolitan Detroit Bricklayers District Council, International Union Bricklayers and Allied Craftsmen, AFL-CIO v. J.E. Hoetger & Co., 672 F.2d 580 (6th Cir. 1982)..... 8

Seaway Port Authority v. Duluth-Superior ILA Marine Ass'n Restated Pension Plan, 920 F.2d 503 (8th Cir. 1990), *cert. denied*, 501 U.S. 1218 (1991)..... 3, 4, 6

Teamsters Joint Counsel No. 83 v. Centra, Inc., 947 F.2d 115 (4th Cir. 1991)..... 10

TABLE OF AUTHORITIES – Continued

Page(s)

STATUTES

Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §1381 et seq 3

29 U.S.C. §1381 ..... 2, 5, 7, 9

29 U.S.C. §1381(a) 2, 5

29 U.S.C. §1392(a) 4, 5, 6

29 U.S.C. §1401(a)(1) 9

OTHER AUTHORITIES

Pension Benefit Guaranty Corporation Opinion Letter 85-14 (May 28, 1985) 7, 8

Pension Benefit Guaranty Corporation Opinion Letter 86-10 (April 10, 1986) 7, 8

STATEMENT OF THE CASE

An accurate statement of the case in the proceeding below is reported in the opinion of the Eighth Circuit, reported at 63 F.3d 703 (8th Cir. 1995) and is reprinted in Petitioner's Appendix at App. 1-4. However, in order to comply with Rule 15 of the Supreme Court Rules, and address any perceived misstatements of fact set forth in the Petition, Respondent would call the Court's attention to the following significant facts which were omitted from the Petitioner's Statement of the Case.

In 1965, Rheem entered into a Drivers Service Agreement with Knight Associates ("Knight"). Under this Agreement, Knight would provide Rheem with truck drivers. Paragraph 6 of the Agreement specifically states that " . . . the drivers are, and will continue to be, [Knight] employees. [Knight] will pay the drivers' wages *and provide all of the benefits required by any applicable collective bargaining agreement which may be in effect from time to time . . .* " [emphasis added].

Between 1975 and 1991, Knight made contributions to Central States on behalf of these drivers. Rheem never made such contributions. Rheem never entered into a collective bargaining agreement with the union representing these drivers. Rheem never signed Central States' Trust Agreement that established the contribution duty from 1975-1991. In fact, this Rheem location never made any payments of any kind to Central States from 1975-1991.

On or about June 15, 1991, Rheem terminated its Agreement with Knight and began leasing drivers from a company called Leaseway Personnel Corporation. Knight

subsequently ceased its contributions to Central States, and Central States initially notified Knight that it had incurred withdrawal liability under 29 U.S.C. §1381. It was only on January 28, 1994, *after* it had been unable to collect the full amount of withdrawal liability from Knight, that Central States sent Rheem a formal notice and demand for payment of withdrawal liability. Rheem then commenced a declaratory judgment action in District Court, asking the Court to determine whether or not it was ever an "employer" subject to withdrawal liability under 29 U.S.C. §1381(a).

REASONS TO DENY THE WRIT

SUMMARY OF ARGUMENT

In support of its Petition, the Petitioner alleges that: (1) The Eighth Circuit's opinion is in conflict with decisions of the Second and Eleventh Circuit, and (2) the issue of whether an entity was ever an employer for purposes of withdrawal liability must go to arbitration first. Contrary to the allegation made by Petitioner, the Eighth Circuit's opinion is not in conflict with the definition of employer utilized by the Second and Eleventh Circuits. In fact, the definition of employer which the Eighth Circuit applied is *identical* to the definition used by the Second and Eleventh Circuits. The second issue raised by Petitioner, concerning the requirement of arbitration, has been previously addressed by *six* other courts of appeals, all of whom reached the same result as that of the Eighth Circuit. Therefore, since the Eighth Circuit's ruling is in complete conformity with the rulings from the other courts of appeals who have previously addressed

these issues, and there is already uniformity among these courts, the issues raised by Petitioner do not support a writ of certiorari and the Petition should be denied.

A. THE DECISION OF THE EIGHTH CIRCUIT IS NOT IN CONFLICT WITH THE DECISIONS OF THE SECOND AND ELEVENTH CIRCUITS.

1. The Eighth Circuit expressly adopted the definition of "employer" used by the Second and Eleventh Circuits.

Under the provisions of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. §§1381-1451, before a party can be assessed with withdrawal liability, that party must be an "employer". However the MPPAA itself contains no definition of the term "employer," and the determination of who is an "employer" for purposes of the MPPAA is one for the courts. In *Seaway Port Authority v. Duluth-Superior ILA Marin Ass'n Restated Pension Plan*, 920 F.2d 503 (8th Cir. 1990), *cert. denied*, 501 U.S. 1218 (1991), the Eighth Circuit was faced with the issue of defining an "employer" for purposes of the MPPAA. Since this was a case of first impression, the Eighth Circuit reviewed the decisions of other circuits in defining this term. After analyzing these decisions at length, the Eighth Circuit defined the term employer as "a person who is obligated to contribute to a plan either as a direct employer or in the interest of an employer of the plan's participants." *Id.* at 507. This is the same definition that was adopted by the Second Circuit in *Korea Shipping Corp. v. New York Shipping Ass'n – Int'l. Longshoremen's Ass'n Pension Trust Fund*, 880 F.2d 1531, 1537 (2nd Cir. 1989) and the definition which was

adopted by the Eleventh Circuit in *Carriers Container Council, Inc. v. Mobile Steamship. Ass'n – Int'l Longshoreman's Ass'n, AFL-CIO Pension Plan & Trust*, 896 F.2d 1330, 1343 (11th Cir. 1990), *cert. denied*, 498 U.S. 926 (1990).

The current case was almost identical to *Seaway*, in that the Eighth Circuit was once again asked to define employer for purposes of the MPPAA. The Eighth Circuit followed its precedent in *Seaway*, and once again adopted the definition of employer set forth in *Korea Shipping* and *Carriers Container*. Thus, the Petitioner's allegation that the Eighth Circuit's definition is in conflict with the decisions of the Second and the Eleventh Circuit on the definition of employer is wholly inaccurate. In fact, since the Eighth Circuit adopted the exact same definition of employer which was used by the Second and Eleventh Circuits, Petitioner's allegation would appear to be more than a "perceived misstatement"; it is closer to a blatant misrepresentation.

Since the undisputed fact is that the Eighth Circuit's definition of employer is identical to the definition utilized by the Second and Eleventh Circuits, there is no "special and important reason" to review that decision, and Central States' Petition for writ of certiorari should be denied.

2. Petitioner's reliance on 29 U.S.C §1392(a) is improper and inapplicable.

Since Respondent is clearly not an employer for purposes of the MPPAA under the definition expressed by the Second, Eleventh, and Eighth Circuits, Petitioner attempts to "create" its own definition of employer by

"boot strapping" the definition of "obligation to contribute" from 29 U.S.C. §1392(a) into the definition espoused by these courts of appeals. However, the definition stated by these courts is that the term employer in 29 U.S.C §1381(a) means "a person who is obligated to contribute to a plan either as a direct employer or in the interest of an employer of the plan's participants." Rather than accept this definition, Petitioner takes three words from the middle of that definition, "obligated to contribute" and attempts to change the definition to "a person who is obligated to contribute as set forth in 29 U.S.C. §1392(a)". However, that is not the definition which these courts have expressed, and thus attempted boot strapping by Petitioner in order to obtain the result it desires can not be allowed. The Eighth Circuit found no contractual obligation on the part of Respondent, and Petitioner is attempting to impose liability in the absence of such affirmative obligation.

While Petitioner claims that the Eighth Circuit has erred by not applying its definition, and utilized 29 U.S.C. §1392(a) in determining if Rheem must pay withdrawal liability, it can cite absolutely no caselaw in support of its position. In fact, none of the cases from the Second and Eleventh Circuit which are set forth in the Petition even mention 29 U.S.C §1392(a). Thus, not only is Petitioner's analysis improper, there is also a complete lack of authority to support its position.

One need only look at the express language of 29 U.S.C. §1392(a) to determine why no court has adopted Petitioner's definition. The issue before the Eighth Circuit was whether or not Rheem was an employer who must pay withdrawal liability pursuant to 29 U.S.C. §1381. Thus, the definition of employer which the lower court was determining had to do with an entity which would

be liable for withdrawal liability. 29 U.S.C §1392(a) specifically states that it "does not include an obligation to pay withdrawal liability". Since the exact statute upon which Petitioner relies expressly prohibits its use in relation to §1381, and this is the exact use which Petitioner is seeking to assert, it is obvious that no court would rely on 29 U.S.C. §1392(a) to determine who is an employer for purposes of the MPPAA.

Before leaving this area, one final "perceived misstatement" should be called to the Court's attention. After analyzing the relevant case law regarding the definition of employer for purposes of the MPPAA, the Eighth Circuit determined that all of the cases have one thing in common - the employers were contractually obligated to make pension contributions. *Seaway*, 920 F.2d at 509. According to Petitioner, that statement by the Eighth Circuit is in conflict with the Second Circuit; in particular, the Second Circuit's decision in *Bowers v. Transportacion Maritima Mexicana S.A.*, 901 F.2d 258 (2nd Cir. 1990). Once again, this allegation by Petitioner is contradictory to the express language of the case upon which it relies. In *Bowers*, the Second Circuit specifically stated "If the payments were made pursuant to contractual obligations, TMM was an 'employer' subject to withdrawal liability." *Bowers*, 901 F.2d at 262. As this excerpt demonstrates, the Eighth Circuit's reliance on a contractual obligation is in complete agreement with the Second Circuit's holding in *Bowers*.

Petitioner alleges that its Petition for writ of certiorari should be granted because the Eighth Circuit's definition of employer for purposes of the MPPAA is in

conflict with decisions of the Second and Eleventh Circuits defining that term. However, a comparison of the three cases cited in its Petition to the decision of the court below indicates that this allegation is wholly untrue. In fact, the definition of employer for purposes of the MPPAA which was utilized by the Eighth Circuit is identical to the definition of employer which was utilized by the Second and Eleventh Circuits. Consequently, since all three of these circuits share the same definition of employer, there is no "special and important reason" for granting Central States' Petition for writ of certiorari, and the Petition should be denied.

3. There is no conflict between the decision below and interpretations of the federal agency that oversees MPPAA.

Petitioner alleges that the Eighth Circuit's decision below flatly contradicts national pension law policy as articulated by a federal agency charged with interpreting the relevant statute. In support of its claim, Petitioner cites PBGC Opinion Letter 85-14 (May 28, 1985) (Appendix at App.39-41) and PBGC Opinion Letter 86-10 (April 10, 1986) (Appendix at App.42-45)

The authority cited by Petitioner does suggest that "joint employers" can, under certain circumstances, be MPPAA employers. However, this authority does not stand for the proposition that a "joint employer" is automatically an employer under 29 U.S.C. §1381. In pertinent part the cited PBGC advisory opinion, PGBC Opinion Letter 85-14, states:

> *You have represented* that your client is an employer (joint employer) which *may have an obligation* under the NLRA *to contribute* to the Plan. *If* such an obligation were found to exist, your client would be subject to Title IV's withdrawal liability provisions. . . . Consequently, *if no contributions were required* to be made by the employer, *there would ordinarily be no liability.* [Emphasis added]
>
> PGBC Opinion Letter 85-14 (Appendix at App.40)

Thus, PBGC Opinion Letter 85-14 reveals there must also be an "obligation to contribute", even when "joint employer" status exists, before withdrawal liability can be imposed under 29 U.S.C. §1392.

The Sixth Circuit made a similar observation concerning the assumption of benefit obligations in *Metropolitan Detroit Bricklayers District Council, International Union Bricklayers and Allied Craftsmen, AFL-CIO v. J.E. Hoetger & Co.*, 672 F.2d 580, 583 fn. 5 (6th Cir. 1982). There the Sixth Circuit noted that an employer, which did not undertake liability under a collective bargaining agreement, would not necessarily be liable for collectively bargained fringe benefits even if it were found to be a joint employer with a signatory party to the agreement.

PBGC Opinion Letter 86-10 (April 10, 1986) (App. 42-45) reiterates these requirements and clarifies its view of the difference between an "obligation to contribute" and "contributions required to be made by the employer". In this later opinion letter, the PBGC specifically determined that "Employer A" was liable for withdrawal liability only for those years when contributions

were "required to be made by the employer." (App. 44). As noted by the District Court and the Eighth Circuit, Respondent has *never* undertaken the requirement to make contributions to Petitioner's fund.

Therefore, Respondent respectfully submits that the Eighth Circuit's decision below does not contradict national pension law policy articulated by the PBGC, and this reason for granting the writ is not well founded.

B. THE COURTS OF APPEALS HAVE CORRECTLY DETERMINED THAT THE ISSUE OF STATUTORY EMPLOYER COVERAGE UNDER THE MPPAA IS ONE TO BE RESOLVED BY THE COURTS PRIOR TO ANY EXHAUSTION OF ARBITRATION.

Petitioner's third argument is that the Eighth Circuit erred in failing to require Respondent to arbitrate its dispute with Petitioner prior to seeking relief in federal court. 29 U.S.C §1401(a)(1) states that "any dispute between an employer and the plan sponsor of a multi-employer plan concerning a determination made under §§1381-1399 of this title shall be resolved through arbitration." The Eighth Circuit held that Respondent's action in seeking a declaratory judgment on the issue of whether or not it was ever an employer as that term is defined in 29 U.S.C §1381 was a purely legal question which did not require exhaustion of the arbitration process.

The courts of appeals from the Second, Third, Fourth, Sixth, Seventh and Ninth Circuits are all in agreement that in a declaratory judgment action like the one brought by Respondent (concerning the issue of whether an entity was ever an employer) there is no requirement that the

company first proceed through arbitration. *See Bowers v. Transportacion Maritima Mexicana S.A.*, 901 F.2d 258 (2nd Cir. 1990); *Board of Trustees of Trucking Employees Pension Fund v. Centra*, 983 F.2d 495 (3rd Cir. 1992); *Teamsters Joint Counsel No. 83 v. Centra Inc.*, 947 F.2d 115 (4th Cir. 1991); *Mason & Dixon Tank Lines, Inc. v. Central States, Southeast and Southwest Areas Pension Funds*, 952 F.2d 156 (6th Cir. 1988); *Banner v. Central States, Southeast and Southwest Pension Fund*, 875 F.2d 1285 (7th Cir. 1989); *Flying Tiger Line v. Teamsters Pension Trust Fund*, 830 F.2d 1241 (9th Cir. 1987). It is interesting to note that this same Petitioner, Central States, has raised this same issue – to no avail – in a number of federal courts and courts of appeals across the country.

Since six other courts of appeals have reached the same decision as that reached by the Eighth Circuit in the current case concerning the ability of an entity to proceed directly to federal court on the purely legal issue of whether the entity was ever an employer for purposes of the MPPAA, there is obviously no "special and important reason" which would justify granting certiorari on this issue. Therefore, Petitioner's writ of certiorari should be denied.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

RUSSELL GUNTER
Counsel of Record
ABRAHAM BOGOSLAVSKY
McGLINCHEY STAFFORD LANG,
A Professional Limited
Liability Company
425 West Capitol Avenue
Suite 3900
Little Rock, Arkansas 72201
(501) 371-9999

HUGO SWAN, JR.
McGLINCHEY STAFFORD LANG,
A Professional Limited
Liability Company
101 North 10th Street
Suite D
Fort Smith, Arkansas 72901
(501) 783-8200